

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN DAVID KNIGHT,

Defendant-Appellant.

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UNPUBLISHED

January 19, 2017

No. 329872

Alger Circuit Court

LC No. 14-002125-FC

Before: O'CONNELL, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of first-degree arson, MCL 750.72. Defendant committed the offense while in prison. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 11 years, 3 months to 25 years in prison, to be served consecutively to the sentence defendant was already serving. We affirm.

**I. FACTS**

The fire in this case occurred on June 4, 2014 in the segregation unit of Alger Correctional Facility, where defendant was serving a prison sentence. Defendant argued that he set the fire under duress. He did not believe that Alger was adequately treating his "sugar diabetes" and epilepsy, thought that he should have been given better epilepsy medication, and claimed that his blood sugars were never under control because Alger personnel "would always mess with [his] insulin doses." He also claimed that he was being harassed by prison officers, which brought on stress, lowered his blood sugars, and caused seizures. Other Alger inmates supported defendant's claims. One testified that a sergeant had threatened to kill defendant. Defendant testified that he "felt that [he] was gonna die at any given time" from improper medication, and the potential for having a seizure during which he could fall and injure himself. Accordingly, he requested a transfer to another prison. His transfer request, however, was denied.

Defendant testified that on June 3, 2014 he had a seizure, and that he had another seizure on June 4, 2014, the day of the fire. He claimed that on this same day, Alger personnel threatened to enter his cell and chain him to the bed so that an officer could sodomize him. Defendant claimed that personnel "started bringin[g] other officers into the block to come in and chain [defendant] to the bed." The identified officers were working on the day of the fire and two had gone to defendant's cell, but they denied defendant's accusations. Nonetheless,

defendant testified that he feared for his life, had no time to file a grievance, was aware that another Alger prisoner had previously started a fire in order to be transferred, and so he “did what [he] had to do to be transferred from” Alger: he set a fire. The log book indicates that defendant lit the fire at 7:54 p.m. Prison employees discovered the fire, extinguished it, removed defendant from his cell, and then evacuated other impacted prisoners. At trial, defendant argued that he acted out of duress.

In his closing argument, defense counsel discussed how the threat of sodomy related to a defense of duress. Plaintiff objected, and the following exchange ensued:

*Defense counsel Ruiz.* Frankly the single most important jury instruction that you’re gonna hear and read about is duress. And . . . it says that [defendant] has to have come under some threat . . . of death or serious bodily injury. [Defendant] took the stand, he told you directly numerous, numerous times, you heard from the other four inmates, that his life was threatened. Now, Prosecution points out that, you know, they threatened to chain him and—and digitally penetrate him; last I checked, being sodomized was a threat of serious bodily injury. But not only that—”

*Plaintiff.* I’m gonna object to that, your Honor. That is—There is no injury required in that crime, or even contemplated.

*Defense counsel Ruiz.* Your Honor, absolutely there is. You—There is, your Honor. I mean, if you—I’ll let you make—

*Trial court.* Well—

*Defense counsel Ruiz.* —the ruling, but—

*Trial court.* —it’s the argument, for one thing; secondly, the instructions will be clear as to what’s involved. But, what am I missing here?

*Defense counsel Ruiz.* I—I don’t know.

*Plaintiff.* The Counsel is claiming that sodomy is a serious bodily injury.

*Defense counsel Ruiz.* In the—

*Plaintiff.* And it—

*Defense counsel Ruiz.* —way that it portrayed, absolutely.

*Trial court.* Without more, I would have to disagree, Mr.—Mr. Ruiz, so—

*Defense counsel Ruiz.* Well, even—even going on the threat of exposing his tattoos to other inmates, at that point, what that’s gonna do is put him in jeopardy of being attacked, shanked. You heard from the other witnesses, anything can happen. Exposing him as being a—a child molester or a CSC

inmate is gonna increasingly put him at risk, risk of being—of anything; Stabbed, having chemicals thrown on you, being killed, frankly. And—And that is the type of duress that we’re referring to.

The trial court provided jury instructions following closing arguments, including an instruction outlining the duress defense. The instruction did not define serious bodily injury. Afterwards, outside the presence of the jury, defendant objected to the trial court’s ruling “that the jury couldn’t consider sodomy . . . [as] a serious bodily injury.” Defendant argued that whether forced digital penetration sodomy constituted a serious bodily injury was a jury question and that defendant had a right to present to the jury. Accordingly, defense counsel requested “two curative instructions”: (1) an instruction defining “serious bodily injury” and (2) an instruction that if the jury “believe[d] based on the facts and the testimony that this alleged sodomy could have resulted in” serious bodily injury, such a belief could support a finding of duress. The trial court clarified that it had ruled that “more testimony and, or facts” were required to go “further down [that] path.” And the trial court noted that it would review a curative instruction, “but nothing more, . . . without any definitions [of serious bodily injury] being provided with the . . . [duress jury] instruction itself.” Defendant did not present a more specific curative instruction for review, and the trial court offered no further jury instructions.

## II. ANALYSIS

### A. DURESS JURY INSTRUCTIONS

First, defendant argues that his conviction should be reversed because the trial court violated his substantial rights and reduced plaintiff’s burden of proof when it infringed upon the jury’s right to determine whether defendant acted under duress by instructing the jury that a threat of sodomy could not constitute serious bodily injury. We disagree.

We review jury instruction issues involving questions of law de novo. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). We review for an abuse of discretion a trial court’s determination whether a jury instruction is applicable to the facts. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

A defendant has a right to have a properly instructed jury when considering the evidence presented at trial and to have the jury instructed on all elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Henderson*, 306 Mich App 1, 4; 854 NW2d 234 (2014). Accordingly, trial courts must “charge the jury concerning the law applicable to the case.” *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995).

A defendant is entitled to an instruction on the common-law affirmative defense of duress when the defendant has “produce[d] some evidence from which the jury can conclude that the essential elements of the defense are present.” *Henderson*, 306 Mich App at 4. The elements necessary to establish the defense of duress are:

A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

D) The defendant committed the act to avoid the threatened harm. [*People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975); see also *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997).]

Our Supreme Court has concluded that a threat of serious bodily harm can include a threat of “homosexual attack,” *Luther*, 394 Mich at 620-623, and equated forcible rape with serious bodily harm, *People v Heflin*, 434 Mich 482, 511; 456 NW2d 10 (1990).

To determine whether a jury instruction error warrants reversal of a conviction, we examine the instructions as a whole to assess whether they sufficiently protected the defendant’s rights. *Kowalski*, 489 Mich at 501; *Moldenhauer*, 210 Mich App at 159. A trial court commits instructional error requiring reversal when it usurps “the right of the jury to determine all elements of an offense . . . .” *People v Reed*, 393 Mich 342, 351; 224 NW2d 867 (1975).

Here, defendant incorrectly argues that the trial court’s statements during closing argument constituted an improper duress jury instruction. The trial court’s comments are unclear. It disagreed with some assertion by defense counsel, but it is unclear to what exactly the trial court was referring. Regardless, the comments were not a jury instruction. The trial court directed no comment toward the jury. It did not “direct[] or guide[] . . . [the] jury concerning the law of the case,” *Black’s Law Dictionary* (10th ed), or “charge the jury,” *Moldenhauer*, 210 Mich App at 159. Rather, the trial court appeared to be a ruling on an objection, or “commenting on the evidence.” See *Reed*, 393 Mich at 351. When the trial court later stated that it had ruled during closing argument that there were not enough facts “to proceed down that path, given the testimony,” it did so outside the presence of the jury.

Following closing arguments, the trial court properly instructed the jury such that “the jury instructions, taken as a whole, sufficiently protected the defendant’s rights.” *Moldenhauer*, 210 Mich App at 159. At trial, defendant asserted two main threats supporting his duress defense. First, he asserted that he was under a general threat of serious bodily injury from improper medical care and exacerbated by prison official harassment, and which triggered seizures. Defendant testified that he suffered a seizure the day of the fire, a day when some of the officials who defendant claimed harassed him were working at Alger. Defendant explained that he “felt that [he] was gonna [sic] die at any given time” due to improper medication, the potential for seizure, and the accompanying potential that he could fall and injure himself. Second, defendant asserted that he was under a specific threat of sodomy, i.e., a threat of serious bodily harm. See *Luther*, 394 Mich at 620-623; *Heflin*, 434 Mich at 511. Evidence showed that the officers involved in the threat were present at defendant’s cell or working in defendant’s unit within the hour before the fire. Moreover, defendant testified that in light of these threats, he “feared for [his] life.” Defendant testified that he started the fire in order to extract himself from Alger. Accordingly, the trial court instructed the jury on the duress defense, informing it that

The Defendant says that he is not guilty because someone else's threatening behavior made him act as he did. This is called the defense of duress. The Defendant is not guilty if he committed the crime under duress. Under the law, there was duress if four things were true: One, the threatening behavior would have made a reasonable person fear death or serious bodily injury; two, the Defendant actually was afraid of death or serious bodily harm; three, the Defendant had this fear at the time he acted; and four, the Defendant committed the act to avoid the threatened harm. In deciding whether duress made the Defendant act as he did, think carefully about all the circumstances as shown by the evidence. Think about the nature of any force or threats. Think about the background and character of the person who made the threats or used force. Think about the Defendant's situation when he committed the alleged act; could he have avoided the harm he feared, in some other way than by committing the act? Think about how reasonable these other means would have seemed to a person in the Defendant's situation at the time of the alleged act. The Prosecutor must prove beyond a reasonable doubt that the Defendant was not acting under duress. If she fails to do so, then you must find the Defendant not guilty.

This instruction is almost identical to the model criminal jury instruction for duress. Compare M Crim JI 7.6. In its instruction, the trial court provided no limit on what could constitute "serious bodily harm," contrary to defendant's argument on appeal.

Notably, the remainder of the jury instructions mitigated any potential, improper inference that the jury may have drawn from the objection argument and ruling during defendant's closing argument. Specifically, the trial court instructed the jury that it "must decide the case based only on the evidence," that the "lawyers' statement and arguments . . . are not evidence," and that the trial court's "comments or opinions or rulings . . . are not evidence." Further, the trial court instructed the jury that when it "make[s] a comment . . . [it is] not trying to influence [the jury's] vote or express a personal opinion about the case" and that if the jury "believe[s] that [the trial court] ha[s] an opinion," it "must pay no attention to that opinion" and, instead, "decide this case from the evidence." "[J]urors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

When viewing the jury instructions as a whole, the trial court did not instruct the jury that it could not consider whether a threat of sodomy constituted a threat of serious bodily injury sufficient to sustain a duress defense. Moreover, the trial court did not provide an inaccurate duress instruction and did not usurp the role of the jury to determine all elements of an offense. Thus, the trial court committed no instructional error warranting reversal.

#### B. POST-LOCKRIDGE OV SCORING

Defendant argues that the trial court violated his Sixth and Fourteenth Amendment rights by using judicial fact-finding to increase his guideline minimum sentencing range. Again, we disagree.

Defendant admits that he raised no such challenge to his sentence in the trial court. Therefore, we review defendant's unpreserved claim for plain error. *People v Carines*, 460 Mich

750, 763; 597 NW2d 130 (1999). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Id.*

On July 29, 2015, our Supreme Court held in *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015), that Michigan’s sentencing guidelines are “constitutionally deficient” to “the extent [that they] *require* judicial fact-finding beyond the facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range . . . .” (Emphasis in original). Such a scheme “violates the Sixth Amendment.” *Id.* at 373. To remedy this problem, the Court rendered the guidelines “advisory only.” *Id.* at 399. Post-*Lockridge*, trial courts must still consult and consider the sentencing guidelines when imposing a sentence. *Id.* at 391. In doing so, trial courts may still calculate OVs using judicial fact-finding, *id.* at 391-392, but trial courts are no longer “*bound* by the applicable sentencing guidelines range.” *Id.* at 392 (emphasis in original). Now, trial courts may depart from that range so long as the departure is “reasonable[ ].” *Id.*

In this case, there is no evidence that the trial court mandatorily applied the guideline minimum sentencing range in violation of defendant’s Sixth Amendment rights. The trial court sentenced defendant on September 21, 2015, *after Lockridge*’s July 29, 2015 decision rendered the guidelines “advisory only.” The trial court was bound by *Lockridge*. See *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005) (noting that this Court and all lower courts are bound by the opinions of our Supreme Court). We have no indication that the trial court failed to follow this binding precedent. Instead, the evidence shows that the trial court was aware of *Lockridge* as defense counsel acknowledged defendant’s guideline minimum sentencing range of 135 to 450 months at sentencing, but requested “something more in the range of 40 months” “based on *Lockridge*.” Therefore, we find no plain error.

Additionally, defendant appears to argue that the trial court inaccurately scored OVs 3, 9, and 19, but he fails to explain how or why the trial court arrived at inaccurate scores. Defendant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claim. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). In doing so, defendant has abandoned this issue. *Id.*

We affirm.

/s/ Peter D. O'Connell  
/s/ Jane E. Markey  
/s/ Christopher M. Murray